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IN THE

Supreme Court of the United States

October Term, 1947.

No. 214

MRS. ABA BADGER SUTTLE, Widow of JOHN G. SUTTLE, individually and as administratrix of the Estate of JOHN G. SUTTLE, Deceased, Etc.,

Petitioner,

versus

REICH BROS. CONSTRUCTION CO. ET AL,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JOHN D. MILLER,
HENRY G. BLOCH,
JOHN R. ANDERSON,
W. A. BLAIR,
C. F. ENGLE,
S. B. LAUB,
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HAUSER PRINTING CO., INC.

SYLLABUS

Where suit was brought in the Eastern District of Louisiana by a citizen and resident of Mississippi against citizens and residents of the Western District of Louisiana and a Texas corporation whose agent for service of process resided in the Eastern District of Louisiana, and such corporation, by state law, was a resident of the Eastern District, the *venue* was properly laid in either district.

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Point 1

The Honorable Circuit Court of Appeals for the Fifth Circuit has rendered a decision which is in conflict with other decisions of the Circuit Courts of Appeals on the same matter and which is in conflict with decisions of this Honorable Court by holding, in effect, that "Citizenship", as required for jurisdictional purposes in the Federal Courts, is synonymous with "Residence", as required for venue purposes in the Federal Courts, the principal ground upon which the judgment of the Fifth Circuit Court was based in this case being that, if the corporation-defendant was declared a resident for venue

purposes, then it would thereby be a citizen for jurisdictional purposes.

The jurisdiction of the Federal Courts is set out in the Constitution of the United States. Article 3, Section 2 of the Constitution of the United States, states "The judicial power shall extend to * * * controversies between **citizens** of different states."

The venue of the Federal Courts is statutory; Section 113, Title 28 U.S.C. states, "but if there are two or more defendants **residing** in different districts of the state it may be brought in either district." In other words, the jurisdiction of the Federal Courts depend upon **citizenship**; while the venue in this case depends upon **residence.**

Until the decision below the Federal Courts have always recognized the difference between "citizenship" and "residence". The Supreme Court of the United States in the case of *Steigleder vs. McQuesten*, 198 U.S. 141, 49 Lawyers Edition page 986, states "It is to be observed that the grounds assigned for the motion to dismiss the cause, taken alone, did not distinctly raise any question concerning the absence of diverse citizenship; for the motion only stated that the plaintiff and the defendants were, respectively, residents of the State of Washington. But it has long been settled that residence and citizenship were wholly different things within the meaning of the Constitution, and the laws defining and regulating the jurisdiction of the Circuit Courts of the United States, and that a mere averment of residence in a particular state is not an averment of citizenship in that state for the purpose of jurisdiction."

In the case of *LaTourette vs. McMaster*, 248 U.S. 465, 63 Lawyers Edition 362, the Supreme Court of the

United States discusses the distinction between citizenship and residence, and Justice McKenna, speaking for the Court about the South Carolina statute in question in the case, states "The word 'resident' and 'citizen' are both used, each apparently in its ordinary legal sense which is well defined and understood making a distinction which is substantial in its purpose and one that is sanctioned by the highest jurisdictional authority."

We respectfully call the Court's attention to the line of decisions of the United States Supreme Court, distinguishing between the terms "citizenship" and "residence":

Parker vs. Overman, 59 U.S. 318-18 How. 137;

Robertson vs. Cease, 97 U.S. 646, 24 L. Ed. 1057;

Realty Holding Co. vs. Donaldson, 268 U.S. 396, 60 L. Ed. 1014;

Oxley Stone Co. vs. Butler, 166 U.S. 648, 41 L. Ed. 1149;

and this recognized distinction between residence and citizenship is still followed by the Federal Courts, as shown by the following recent decisions:

Fort Knox Transit vs. Humphrey, 151 F. 2nd 602;

Townsend vs. Bucyrus-Erie Co., 144 F. 2nd 106;

Jeffcott et al vs. Donovan, 135 F. 2nd 213;

Fowler vs. Baker, 32 F. Supp. 783;

Hoskie vs. Prudential Ins. Co. of America, 39 F. Supp. 305;

Shreveport Longleaf Lumber Co. vs. Wilson, 38 F. Supp. 629;

Baker vs. Keck, 13 F. Sup. 486;

We particularly call the Court's attention to the case of *Townsend vs. Bucyrus-Erie Company, supra* in which Judge Murrah, speaking for the Circuit Court of Appeals for the Tenth Circuit, states "State citizenship for the purpose of conferring jurisdiction in diversity of citizenship cases under Section 24 of the Judicial Code 28 U.S.C.A. Section 41 (1), and residence in a judicial district for venue purposes under Section 51 of the Judicial Code 28 U.S.C.A. Section 112, are not necessarily one and the same thing—they are not synonymous, coexistent or convertible terms. One may have a residence in a state while his citizenship continues in another." In the case of *Jeffcott vs. Donovan, supra* Judge Stephens, speaking for the Circuit Court of Appeals for the Ninth Circuit, states "Diversity of citizenship as a basis for the jurisdiction of a case in the District Court of the United States is not dependent upon the residence of any of the parties, but upon their citizenship. Bouvier (Baldwin's Student Edition 1934) says: 'Citizen and resident (p. v.) are not synonymous and in some cases distinction is important.' It might well be that a resident of any one state in point of fact may be a citizen of that or any other state." And this is particularly true of a corporation. * * * In *International Milling Co. v. Columbia Transportation Co.*, 292 U.S. 511, 78 L. Ed. 1396, Justice Cardozo, in referring to the *Taylor* case (266 U.S. 200, 69 L. Ed. 247, 42 A.L.R. 1232) pointed out that in the case cited it had been held that the Plaintiff Delaware corporation, with a usual place of business in Missouri "is a resident of Missouri—that is, has a usual place of business within

the State." As to the Delaware corporation he said: "For many purposes, its domicile in law is in the state of its creation (citing cases), but it is living its life elsewhere. In a very real and practical sense, it is a resident of the forum, like the plaintiff in the *Taylor* case, who was domiciled in one State and resided in another. * * * Residence, however, even though not controlling, is a fact of high significance."

We therefore submit that the Circuit Court of Appeals for the Fifth Circuit was in error in holding that if the corporation were declared a resident of a particular Federal District in a state for venue purposes, it would thereby become a citizen of that state for jurisdictional purposes. At variance with the other Circuits and this Court the Court below held citizen and resident to be synonomous terms.

Point 2

The Honorable Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in conflict with applicable local decisions by holding that the corporation-defendant in this case is a non-resident of the State of Louisiana, whereas the laws and jurisprudence of the State of Louisiana clearly make said corporation a resident of that State.

Citizenship is a term which is defined by the Constitution of the United States in Amendment No. 14 thereof. **Residence,** however, is a term which is not defined by either the Constitution or the statutes of the United States.

The principle of law is too clear to admit of any argument that in all cases except in matters governed by the Constitution or by Acts of Congress, the law to be applied in the Federal Courts is the law of the States.

Townsend vs. Union Trust Company of Maryland, 307 U.S. 646, 83 L. Ed. 1526.

Under the laws of the State of Louisiana, the corporation-defendant in the present case, having complied with the registration laws of the State of Louisiana, and having appointed an agent in that State for service of process, became a resident of the State of Louisiana and of the District in which such agent resides.

White Oil Corporation vs. Flannagan, 153 La. 837, 96 So. 675;

Burgin Bros. vs. Barker Baking Co., 152 La. 1075, 95 So. 227;

Fullilove vs. Central State Bank, 160 La. 831, 107 So. 59;

Noyola vs. Norske Lloyd Ins. Co. Ltd., 163 La. 82, 111 So. 607;

Pittman Bros. Constr. Co. vs. American Indemnity Co., 194 La. 437, 193 So. 699.

The Court below erroneously held, 161 F. 2d. 290, that under the laws of Louisiana such corporations as the co-defendant here become domesticated to the extent that they are not subject to attachment as non-residents. La. Act 267 of 1914, as amended by Act 120 of 1920. These laws do not refer to the subject of attachments against non-residents but cover the method and effect of qualifying to do business in the state. As construed by the State Supreme Court, in the cases cited above, contrary to the reasoning of the Circuit Court of Appeals herein, those laws require such foreign corporations to become residents of the state, for which reason alone they cannot be attached as non-residents.

The Supreme Court of the United States has held

that the question of residence may be differently determined in different states (*Riley vs. N. Y. Trust Company*, 315 U.S. 343, 86 L. Ed., 885) in which case it is announced that conflicting decisions of the states on the matter of residence "is an inevitable consequence of the existing Federal system which endows its citizens with the freedom to choose the state or states within which they desire to carry on business, enjoy their leisure or establish their residence."

In determining the matter of residence, we find the Federal Courts in many cases turning to the Courts of the various states for their decisions on this question. In the case of *Townsend vs. Bucyrus-Erie Co., supra* the Circuit Court of Appeals for the Tenth Circuit cites the case of *Harris vs. Harris*, 205 Ia. 108, 215 N.W. 661 and the case of *Anderson vs. Jackson*, 170 Okla. 612, 41 P. 2nd 815. In the case of *Baker vs. Keck, supra*, Justice Lindley of the Federal Court of the Eastern District of Illinois cites the case of *Dale vs. Irwin*, 78 Ill. 170, in which the Supreme Court of Illinois discusses the statute of the State of Illinois concerning residence, and also cites the case of *Kreitz vs. Behrensmeyer*, 125 Ill. 141, 195, 17 N.E. 232, and the case of *Holt vs. Hendee*, 248 Ill. 288, 93 N.E. 749, in determining the residence of a party in the State of Illinois.

It is well recognized that state legislation and consent of parties may bring about a state of facts which will authorize the Courts of the United States to take cognizance of a case.

Neirbo Co. vs. Bethlehem Shipbuilding Corpn., 308 U.S. 165, 84 L. Ed. 167;

Schollenberger (ex parte) 96 U.S. 369.

We therefore respectfully submit that the Honorable Circuit Court of Appeals for the Fifth Circuit was in error in disregarding the law of the State of Louisiana in determining the residence of the defendant corporation, and directly contrary to the rule of *Eirie R. R. Co. v. Tompkins.* There is no federal common law pertinent to this subject.

Point 3

The Honorable Court of Appeals for the Fifth Circuit has decided an important case of Federal law which has not been but should be settled in this Court, in holding that under Section 113 of Title 28 U.S.C.A., a defendant, citizen and resident in one Federal District of the State cannot be sued in another Federal District of the State where a co-defendant is properly suable.

The precise question of law presented by the instant case is one which should be settled by the Supreme Court of the United States to avoid confusion in procedure in the lower courts. The exact question of venue presented by this case, and the exact situation presented by the facts of this case, have not been decided by the Supreme Court of the United States. In the case of *Barnes vs. Wilson,* 40 F. Supp. 689, the identical situation as in the instant case was presented to the Federal District Court for the Eastern District of Wisconsin. In that case the plaintiff, a resident of California, brought suit against an individual resident of the Western District of Wisconsin, and a foreign insurance corporation which was qualified to do business in the State of Wisconsin, and had appointed an agent for service of process in that state. The action was brought in the Court of the Eastern District of Wisconsin, and the individual defendant moved to dismiss the action on grounds of im-

proper venue. The Court in that case stated: "If the defendant, Wilson, had been sued alone, the proper venue would of course be the Western District of Wisconsin, however, if the defendant insurance company could have been sued in the Eastern District of Wisconsin, the plaintiff had the option when suing both defendants to bring the action in either district." The holding of the Federal District Court of the Eastern District of Wisconsin in this case is directly opposed to the holding of the United States Circuit Court of Appeals for the Fifth District in the instant case.

We respectfully submit that under the present venue rules of the Federal Courts, and the decisions of the United States Supreme Court making foreign corporations amenable to suit in any Federal District of any state in which they have appointed an agent for service of process, the question presented by this instant case will frequently arise, that is, as to the proper venue of a co-defendant of such foreign corporation; and we respectfully submit that this important point of Federal venue should be authoritatively and finally decided and passed upon by the Supreme Court of the United States.

The Court below held that this suit could have been brought in the Western District, where the individual and partnership defendants resided, and service made on the agent of the corporate defendant in the Eastern District, but that it could not be brought in the Eastern District and service made on those defendants in the Western District where they resided. With all respect to that Court it is suggested that this is a distinction without a difference, contrary to the clear intent of the venue statute, and an unreasonable technicality which would prevent the trial of this case where the cause of action arose and the witnesses can be found.

Point 4

The Honorable Circuit Court of Appeals for the Fifth Circuit has decided a Federal question in a way probably in conflict with the applicable decisions of this Court in holding that the partnership-defendant and the members thereof were not properly suable outside of the district of their residence, and refusing to consider the question of an implied waiver or consent by said defendants to be sued outside of the district of their residence.

Prior to the decision of the United States Supreme Court in *Neirbo vs. Bethlehem Ship Building Company*, 308 U.S. 165, 84 L. Ed. 167, it had not been held that a corporation could be sued outside of the state in which it was incorporated, unless plaintiff resided in the state where suit was brought.

The decision in the *Neirbo* case which subjected a corporation to suit in any state in which it had appointed an agent for service of process, was based on the theory of consent by the corporation to be sued where it had appointed such an agent. It was recognized at the time of this decision, and it has never been disputed that this consent on the part of the corporation was a fictional consent, at least prior to that ruling.

Since the *Neirbo* decision this doctrine of fictional consent has been broadened to include situations where a corporation does not acutally appoint an agent, but where an agent is designated by state statutes; and the doctrine of consent has even been extended to situations where individual defendants who are using the highways of a state have been considered as consenting to be sued in the Federal Courts in that state where a state statute designates an agent for service of process, with respect to non-resident motorists, *Krueger vs. Hider*, 48 F. Supp.

708; *Steele vs. Dennis*, 62 F. Supp. 73; *William vs. James*, 34 F. Supp. 61; *O'Donnell vs. Slade*, 5 F. Supp. 265.

No one could seriously contend that there is actual consent on the part of the defendants in these cases. Consent is implied to the defendants by the Federal Courts. It may be entirely fictional, and it is implied for the purpose of broadening the venue statutes so that a defendant can be sued in the Federal Courts of the state where the cause of action arose, and the consent of the defendants has been extended to cover the Federal Courts in any district in such states.

We can see no reason for not applying the doctrine of consent to the Appellee partnership, and the members thereof, in the present case. The Appellee partnership and its members are presumed to know the law; they, therefore, knew that the corporation was suable in the Eastern District of Louisiana; they knew that they could be made joint defendants with the corporation; they sent their trucks and equipment into the Eastern District of Louisiana in the operation of their business.

We respectfully submit that by their knowledge and their acts they consented to be sued in the Eastern District of Louisiana, and that their consent in this case is in effect a more actual consent than the fictional consent in the situations which we have above mentioned.

We also respectfully call the attention of this Honorable Court to the present tendency of the Federal Courts of the United States toward a more liberal interpretation of the Federal venue statute.

As we have above pointed out, prior to the decision in the *Neirbo* case, a corporation could not be sued outside of the state of its incorporation. The *Neirbo* decision

broadened the effect of the venue statutes so that a corporation could be sued in the Federal Courts of a state in which it appointed an agent for service of process. The question then arose as to whether the venue statute in such cases should be restricted to the district where the agent for service of process resided, and in meeting this situation, the Federal Courts again broadened the effect of the venue statute so that a corporation doing business in a state could be sued in any district in that state regardless of the place of residence of its agent for service of process. *Keen vs. Mid-Continent Petroleum Company*, 58 F. Supp. 915. *Dehne vs. Hillman Investment Co.*, 110 F. 2nd 456. *Oklahoma Packing Co. vs. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 60 S.Ct. 215.

As we have pointed out above, the venue statutes have now been further broadened to extend to individuals who are motorists through a state, and under present decisions of the Federal Courts, such defendants may be sued in any Federal district of the state through which they are motoring. *Krueger vs. Hider, supra. Steele vs. Dennis*, 62 F. Supp. 73.

We ask the Court in this case to hold that the Defendant partnership and its members are suable in the Federal District, in which their co-defendant is suable, where the requisite diversity of citizenship exists between the parties.

We respectfully submit to the Court and strongly urge that the term **residence**, as used in the venue statute in question, means nothing more than amenability to suit, and that since the Defendant corporation is amenable to suit in the Eastern District of Louisiana, then the entire requisite of residence under the venue statute in question has been fulfilled so that the Defendant partner-

ship and the members thereof can be brought into the Eastern District of Louisiana for purposes of this suit. To hold otherwise would be to place such a technical and overrefined construction on the term **residence** as to restrict unnecessarily the venue statute in question and as to run completely counter to the present tendency of the Federal Courts to broaden and liberalize the venue statute.

The Defendant partnership and the members thereof in this case were doing business in the Eastern District of Louisiana and were insured by a corporation which was suable in that District. While engaged in the operation of their business they were involved in the accident upon which this suit is based.

The whole tendency of the Federal Courts, as we have above pointed out, is to allow defendants to be sued in more places, particularly in collision cases, with a view toward allowing such cases to be tried in the Federal Courts of the state and district where such accidents occurred.

We most strongly urge this Honorable Court not to bring to a halt this beneficial trend to a simpler, fairer and more just and more convenient trial of cases in the Federal Courts insofar as venue is concerned, and we most strongly urge that the Defendant partnership and the members thereof in this case not be allowed to escape suit in the Eastern District of Louisiana by strict and technical and, as we most sincerely believe, erroneous judicial construction of the term **residence** in the venue statute in question.

Therefore, for the reasons above stated, we respectfully submit that certiorari herein is required for rectification of the manifest errors in the decision of the

Honorable Fifth Circuit Court of Appeals in the instant case, and Petitioner respectfully prays that Writ of Certiorari be granted to review such decision, and that upon such review, the judgment of the said Honorable Fifth Circuit Court of Appeals be reversed and that the judgment of the Trial Court be reversed, or that such other proceedings be had herein as may be in accordance with law.

Respectfully submitted,

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